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No. 44

In the Supreme Court of the United States

OCTOBER TERM, 1968

WILLIAM SKINNER, AUGUST R. GUELDNER and ALTON J. CHARBONNET

v.

STATE OF LOUISIANA

On Petition for Writ of Certiorari to Review Decision of the Supreme Court of Louisiana in State of Louisiana vs. William Skinner, et al., No. 48,445 on the Docket of that Court

RESPONSE OF STATE OF LOUISIANA, RESPONDENT

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No. 1210

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STATEMENT OF THE CASE

On May 21, 1965 Benjamin Fullington, an undercover agent with the Louisiana State Police, went to Skinner's Motor Mart, 2101 Canal Street in New Orleans, and told William Skinner, owner of the mart, and August Gueldner, a car salesman, two of the relators herein, that he was looking for a contact from whom he could buy marijuana. Either Gueldner or Skinner made a phone call, after which Fullington was informed that the pusher (seller) would be at the lot that afternoon. The agent left and returned around 8

in the evening, at which time Skinner introduced Fullington to Alton Charbonnet, alias Joe Jackson, the third relator in this proceeding. Charbonnet told the agent that the stuff (marijuana) was under the seat of a white 1960 Lincoln parked on the lot, whereupon Fullington paid Charbonnet $20, went to the car indicated, and found under the front seat a matchbox filled with marijuana.[1] R. 419-487.

On July 30, 1965 Skinner, Gueldner and Charbonnet were arrested, R. 492-493, and shortly thereafter all three were jointly charged in the first count of a bill of information with selling marijuana to Ben Fullington, and in a second count with unlawfully possessing marijuana. R. 22-23; see La. R.S. 40:962.

The accused pleaded not guilty, were tried, and were found guilty as charged on both counts. They appealed to the Louisiana Supreme Court. Although thirty-five bills of exception were reserved and perfected in the trial court, the accused relied in the Louisiana Supreme Court on six "specifications of error", involving bills numbers 6, 18, 19, 21, 23, 24, 29 and 35. On original hearing the Louisiana Supreme Court completely ignored the established jurisprudence of Louisiana and other jurisdictions and

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[1]On p. 23 of their brief relators cite as proof of Mr. Gill's "illness and exhaustion" the fact that he "had failed to call a key witness for the defense, a party who was to testify as to the true ownership of the automobile in which the marijuana was allegedly found." The ownership of the car parked in the lot in which Charbonnet momentarily hid the marijuana was clearly irrelevant, which is obviously why defense counsel did not bother calling a witness to testify on this point.

set aside the convictions and sentences herein on the ground that bill of exception number 29 was meritorious because the trial judge erred in charging the jury on the law of conspiracy. See *State v. Skinner*, 251 La. 300, 204 So.2d 370, particularly dissents of Sanders and Hawthorne, JJ., at 204 So.2d 377-380.

On application of the State of Louisiana a rehearing was granted and the convictions and sentences of Skinner, Gueldner and Charbonnet were affirmed. See 204 So.2d 380-394.

Relators are now applying to this Honorable Court for a Writ of Certiorari to review the decision of the Louisiana Supreme Court in this matter on rehearing. Relators rely in this Court on three allegations of error involving bills of exception numbers 23, 29 and 35.

ARGUMENT

1. The Absence of Charbonnet From the Hearing of Skinner's and Gueldner's Preliminary Motions

This allegation of error involves bill of exception number 35, which was reserved by Alton Charbonnet when the trial judge overruled his Motion for a New Trial. R. 108, 388-390.

A. Standing To Raise

This particular allegation of error can obviously be urged only by Charbonnet, as Skinner and Gueldner can claim no possible prejudice to themselves arising from the absence of Charbonnet at the hearing of their pre-trial motions. Skinner and Gueldner could have

subpoenaed Charbonnet, who had been unable to make bond, to appear at these hearings had they so wanted, but Skinner and Gueldner clearly did not want Charbonnet to be present because at this early stage of the proceedings Skinner and Gueldner were trying to disassociate themselves completely from Charbonnet, who had told the undercover agent that the marijuana was under the seat of a car parked on Skinner's lot and who was paid $20 by the agent for the "stuff". See R. 42-64, esp. R. 62. Skinner's and Gueldner's only hope, as they viewed the matter prior to their trial and conviction, was to repudiate Charbonnet, the most active member of the trio.

B. Charbonnet Suffered No Prejudice

The minutes in this case show that on August 26, 1965 Alton Charbonnet pleaded not guilty to the charge of sale and possession of marijuana, as did Skinner and Gueldner, and the trial judge ordered Charbonnet to return September 2, 1965 so that the matter of counsel could be determined. On September 2, the matter of Charbonnet's counsel was continued to September 10, 1965, apparently on motion of Charbonnet. R. 1. Hurricane Betsy struck New Orleans and the matter was further delayed. R. 1. On September 20, 1965, Charbonnet having informed the court that he was unable to employ counsel, the trial judge appointed attorney Joseph Monie to represent Charbonnet in this case, R. 2, and from this date on Charbonnet was never without counsel. For reasons of health Monie withdrew as Charbonnet's counsel and the trial judge

appointed attorney Bently Byrnes to represent Charbonnet. Byrnes became seriously ill (he died shortly thereafter), and on January 11, 1966 the court appointed attorney Bernard Burk as Charbonnet's attorney, R. 4. On January 18, 1966 Charbonnet engaged Robert Link, his present attorney, to represent him. R. 5. Apparently because of illness none of the court appointed attorneys filed any pleadings on Charbonnet's behalf. See R. 104.

Meanwhile, on September 21, 1965, the day following Monie's appointment as Charbonnet's attorney, Mr. G. Wray Gill, who had been employed by Skinner and Gueldner to represent them in this case, filed on behalf of Skinner and Gueldner only a Motion for Bill of Particulars; a Motion for Preliminary Examination; a Motion to Quash; a Motion to Quash Application for Search Warrant, Search Warrant itself and the Return on Said Search Warrant; a Motion to Suppress and Dismiss; a Prayer for Oyer; and a Special Plea of Entrapment. R. 2, 34-40, 66-72, 101. Counsel for Charbonnet chose not to join in these pleadings, nor did he file similar pleadings on behalf of his client.

On September 28, 1965 the State of Louisiana, in response to the pleadings filed by Skinner and Gueldner, filed an Answer to the Motion to Quash; a Bill of Particulars; an Answer to the Special Plea of Entrapment; and an Answer to the Motion to Quash Application for Search Warrant, Search Warrant itself and Return of Said Search Warrant. R. 3.

On this same day, September 28, 1965, Mr. Gill *withdrew his Motion to Quash Application for Search Warrant, Search Warrant Itself, and Return on Said Search Warrant*, R. 3, for the reason that on the hearing of the Motion to Suppress it developed that at the time the Louisiana State Police searched Skinner's Motor Mart pursuant to a search warrant following the arrest herein, *nothing was found by the police in the mart and thus there was nothing to suppress.* R. 148. It should be remembered that the matchbox of marijuana which was offered in evidence by the State of Louisiana during the trial of this case had not been seized during a search, but rather had been purchased by undercover agent Fullington from Charbonnet on Skinner's car lot, with the aid and consent of Skinner and Gueldner. See R. 419-425.

The trial judge ruled the State of Louisiana's Bill of Particulars and Answer to Motion to Quash to be good and sufficient in law, R. 3; the Special Plea of Entrapment was overruled, R. 3, and it is important to note that the factual issue of entrapment is not for the judge to determine prior to trial but is a question for the jury as part of its function of determining the guilt or innocence of the accused. See *Sherman v. United States*, 356 U.S. 369 (1958).

On October 8, 1965 the trial judge heard the Motion for Preliminary Examination filed by Skinner and Gueldner for the sole purpose of determining whether the State of Louisiana had sufficient evidence to make out a prima facie case against Skinner and

Gueldner.[2] See R. 38-39; see Arts. 154-155 of Louisiana's 1928 Code of Criminal Procedure, dealing with Preliminary Examination. At the conclusion of this hearing the judge held that the State of Louisiana had made out a prima facie case *as far as these two accuseds were concerned*, and bound them over for trial. ("I do feel the State has made a prima facie case, however, as far as these two defendants are concerned." R. 64) R. 4, 64; see Art. 155 of Louisiana's 1928 Code of Criminal Procedure. On the same day the State of Louisiana filed an Answer to Prayer for Oyer, which the trial court ruled was good and sufficient in law. R. 4.

On January 18, 1966 Charbonnet decided not to rely on court-appointed attorneys (who because of illness had been able to do nothing on his behalf) and engaged Robert S. Link, his present attorney, to represent him. R. 5.

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[2]It is important to note here that Skinner, Gueldner and Charbonnet were at this time charged in separate bills of information with both sale and possession of marijuana under La. R.S. 40:962 and *conspiracy to sell and possess marijuana* under Article 26 of the Louisiana Criminal Code, both of which charges were based on the same facts and circumstances. Both the sale and possession case (the instant one) and the conspiracy case were allotted to Section E of the Criminal District Court for the Parish of Orleans, and identical Motions for Preliminary Examination, etc., were filed by Mr. Gill in both cases on the same date. Thus, it was quite proper for the trial judge to state at the end of Preliminary Examination, R. 64, that the State of Louisiana "has made a prima facie case of a conspiracy to sell narcotics," because the Preliminary Hearing which had just been held involved both the instant sale and possession case and also the conspiracy case.

On January 31, 1966 Mr. Link filed a Motion in the trial court in which motion, see R. 104-105, it is alleged that neither Alton Charbonnet nor any of his attorneys were present at the hearings of the various preliminary pleas which had been filed on behalf of Skinner and Gueldner, and the trial court is asked to make available to Charbonnet's attorney the transcript and/or record of all prior proceedings to

> "permit him to determine whether it is necessary to file supplemental motions in his own behalf and that a minimum of 30 days delay be granted in order for defense counselor to properly study and evaluate the record already taken in these matters *in order to file such pleadings as may be necessary in behalf of your defendant* ALTON J. CHARBONNET." R. 104-105.

The same day as the above motion was filed, the trial judge ordered that the transcripts requested be furnished to Mr. Link. ("The Court . . . ordered the Court Reporter to furnish any and all transcripts to Mr. Link." R. 5)

However, although the pleadings and transcripts requested were promptly given to Mr. Link, and the trial in the present matter did not take place until March 21-22, 1966—almost two months later—Mr. Link filed no motions or pleadings of any kind on behalf of Charbonnet, nor were any pre-trial hearings for Charbonnet requested by him. From this inaction on Mr. Link's part we can only infer that after studying and evaluating the pleadings, transcript, etc., he decided that his client's rights had been fully pro-

tected in every way, and that no further motions needed to be filed on Charbonnet's behalf. Also, the trial judge's action in delaying the trial for two months at the request of Mr. Link indicated the willingness of the trial court to entertain and hear any pleas, motions, etc., which Charbonnet might have wished to file prior to trial.

Furthermore, Mr. Link made no objection prior to trial, or at any time during trial, to Charbonnet's absence from the pre-trial hearings held on motion of Skinner and Gueldner, and no prejudice to Charbonnet because of this absence was at any time called to the trial court's attention.[3] It was only after the trial was finished and Charbonnet had been found guilty by the jury that Mr. Link, in a Motion For New Trial, *for the first time* complained to the trial judge of Charbonnet's absence from the pre-trial hearings held on motion of Skinner and Gueldner. See R. 108.

It is settled in the jurisprudence of Louisiana, and elsewhere, that an accused need not be present during the hearing of preliminary motions addressed to the court, and not making part of the actual trial of the guilt or innocence of the accused. *State v. Basco*, 216 La. 365, 43 So.2d 761; *State v. Pierre*, 39 La.Ann. 9, 3 So. 60; *State v. Fahey*, 35 La. Ann. 9; 5 Wharton, Criminal Law and Procedure 141, sec. 2005 (Anderson, 1957); compare Articles 831, 834 of the present

[3]In fact, Mr. Link used the transcript of the testimony offered at Skinner's and Gueldner's Preliminary Examination to cross-examine witnesses who testified at the trial of this case. See, e.g. R. 481-482.

Louisiana Code of Criminal Procedure and Comments thereunder ("the defendant's presence is not required when motions are made and determined by the court outside of the jury's presence").

The State of Louisiana's position on this issue is: first, that the presence of Charbonnet was not required during the hearing of the various pre-trial motions filed by Skinner and Gueldner in the instant case, as the question of Charbonnet's guilt or innocence was not involved therein, nor was there any ruling on the admissibility of evidence to be used at the trial; second, the State of Louisiana is of the respectful opinion that Charbonnet has waived all rights in the matter because the trial court at defense counsel's request furnished Mr. Link with copies of all pleadings and transcript of all evidence involved in these preliminary matters, and allowed Mr. Link two months prior to trial in which to file any pleadings which Mr. Link thought necessary on behalf of Charbonnet; and third, any error, if it occurred, was harmless, because at no time has Mr. Link pointed out how Charbonnet was prejudiced or how he suffered any unfairness because of his absence from these pre-trial hearings.

2. The Judge's Charge To the Jury On the Law of Conspiracy Was Correct

This allegation of error is grounded on bill of exception number 29. R. 252-253.

Article 385 of Louisiana's 1928 Code of Criminal Procedure, which was in effect during the trial of the

instant proceeding, provides that the trial judge shall charge the jury on the law applicable to the case. See also Art. 802 of Louisiana's 1967 Code of Criminal Procedure.

It is well settled in the Louisiana jurisprudence that a trial judge must charge the jury on every phase of a criminal case which is supported by the evidence, and that failure of the judge to do so amounts to reversible error. *State v. Youngblood*, 235 La. 1087, 106 So.2d 689.

In the instant case Skinner, Gueldner and Charbonnet were jointly charged in two counts of a bill of information with possessing and selling marijuana.[4] R. 22-23. It is settled in Louisiana that where an information charges two or more persons jointly with a crime, *the charge involves a conspiracy* although the information does not expressly charge conspiracy in formal terms. *State v. Robichaux*, 165 La. 497, 115 So. 728; *State v. Terrell*, 175 La. 758, 144 So. 488;

[4]As was pointed out in footnote 2, Skinner, Gueldner and Charbonnet were also charged in a separate bill of information with conspiracy to sell and possess marijuana under Article 26 of the Louisiana Criminal Code, the conspiracy charge being based on the same facts and circumstances as the sale and possession charge. Both the sale and possession case (the present one) and the conspiracy case were allotted to Section E of the Criminal District Court for the Parish of Orleans, and identical Motions for Preliminary Examination, etc., were filed by Mr. Gill in both cases on the same date. Further, the Preliminary Hearing which was held on behalf of Skinner and Gueldner involved both the instant sale and possession case and the conspiracy case, although the present sale and possession case was tried separately from the conspiracy charge, which has never been tried.

State v. Melerine, 236 La. 929, 109 So.2d 471. Hence the instant charge of sale and possession against Skinner, Gueldner and Charbonnet involves a conspiracy under Louisiana law (and under the law of most other jurisdictions).

During the instant trial, frequent objections to testimony were made by Mr. Gill on behalf of Skinner and Gueldner on the ground that the conversation, act, etc., referred to by the witness occurred out of the presence of his clients, and that conspiracy had not been charged in the bill of information herein. See, *e.g.*, bill of exception number 19, R. 206. The trial judge correctly overruled all such objections on the basis that the bill of information herein jointly charges the 3 accused with possessing and selling marijuana, that the State of Louisiana had made out a prima facie case of conspiracy, and that consequently the evidence was admissible under La. R.S. 15:455, which provides that each co-conspirator is deemed to commend whatever is said or done in furtherance of the common enterprise, and it is of no moment that such act was done or such declaration was made out of the presence of the conspirator sought to be bound thereby, but to have this effect a prima facie case of conspiracy must have been established. R. 209.

The trial judge's ruling was in accord with the settled jurisprudence of the Louisiana Supreme Court. See *State v. Gebbia*, 121 La. 1083, 47 So. 32; *State v. Brasseaux*, 163 La. 686, 112 So. 6501; *State v. Terrell*, 175 La. 758, 144 So. 488; *State v. Gunter*, 180 La. 145, 156 So. 203; *State v. Melerine*, 236 La. 929, 109

So.2d 471; see also Marr's Criminal Jurisprudence of Louisiana, vol. 2, p. 848 (2d ed. 1923).

In giving his charge to the jury in the instant case the trial judge instructed the jury in detail on the definition and nature of conspiracy, told the jurors that it was for them to determine, from the evidence, whether or not a conspiracy had been established by the State of Louisiana, and that unless they were satisfied that a conspiracy had been shown, "I charge you that the acts and declarations of one of the parties to the alleged conspiracy do not bind the others".[5] R. 356-359.

In charging the jury in the present case on, among other things, conspiracy, the trial judge was following the mandate of Article 385 of Louisiana's 1928 Code of Criminal Procedure and the unquestioned rulings of the Louisiana Supreme Court. See *State v. Taylor*, 173 La. 1002, 139 So. 325; *State v. Terrell*, 175 La. 758, 144 So. 488; *State v. Capaci*, 179 La. 462, 154 So. 419.[6]

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[5]In their Petition for Certiorari filed in this Court petitioners contend that they were prejudiced by the judge's charge to the jury on conspiracy. The State of Louisiana believes that the contrary is true, and that the judge's admonition to the jury not to impute the acts and declaration of one of the 3 accused to the other 2 unless a conspiracy had been proved beyond a reasonable doubt, was helpful to the accused, if anything, and certainly not prejudicial.

[6]In reversing the conviction on first hearing on the ground that the trial judge erred in charging the jury on conspiracy, the Louisiana Supreme Court relied on its decisions in *State v. Fletcher*, 236 La. 40, 106 So.2d 709; and *State v. Gunter*, 208 La. 694, 23 So.2d 305, which are contrary to the

This Court's attention is directed to the fact that it is the prevailing rule *in all jurisdictions* that where there is evidence that the accused have entered into a conspiracy to commit the crime charged, an instruction to the jury on the law of conspiracy is proper, *even though the indictment or information does not formally charge a conspiracy.* See 53 Am.Jur., Trial, sec. 673, p. 519; 23A C.J.S., Criminal Law, sec. 1278, p. 692.

The trial judge acted correctly in charging the jury herein on the law of conspiracy, in the respectful view of the State of Louisiana.

3. No Prejudice to the Accused Resulted Because the Trial Lasted Until 2:45 A.M. the First Day And Started Again at 9:30 the Following Morning

This allegation of error centers around bill of exception number 23. R. 221-228.

The trial of the instant case began on the morning of March 21, 1966. R. 6. After the jury had been selected the court ordered a recess for lunch. R. 7. At 2:45 p.m. the jurors returned to their seats in the jury box and the court ordered the trial to proceed. R. 7. From 6:15 to 8 p.m. there was a recess for dinner. R. 9. At 11:40 the State rested its case. R. 11. At this time defense counsel complained of feeling tired and asked for a recess. R. 604.

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great weight of the Louisiana jurisprudence on this point, and which simply hold that it was not reversible error in those particular cases for the trial judge to fail to charge the jury on conspiracy.

BY THE COURT: You have been after me all day, Mr. Gill. I've gotten tired of listening to you. I'm going to see if we can't finish this case tonight. Go to work and see if we can't finish the case tonight.

BY MR. GILL: I'll do what Your Honor says.

BY THE COURT: I'm sure everyone is tired. I have already asked the jury if they wanted to attempt to finish this case tonight and if we went to work on it without talking so much . . .

BY MR. GILL: I want to say one thing, Your Honor. I have a severe case of diabetes.

BY THE COURT: I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this case. I will gladly give you a recess for about three minutes and then we will come back and proceed with this case.

BY MR. GILL: May I further say this. I tested myself for sugar . . .

BY THE COURT: We will take a recess for three minutes.

BY MR. GILL: If Your Honor please, I respectfully request Your Honor declare a mistrial.

See R. 604-605.

To the overruling of his Motion for a Mistrial Mr. Gill reserved bill 23. R. 604-605, 221.

The defense then took a recess of thirty-five minutes and proceeded to put on its case from 12:25 a.m. until 2:45 a.m., when the defense rested. R. 12, 605-

688. During these two hours and twenty minutes Mr. Gill called to the stand Thomas Cardona, R. 606-611; James Comeaux, R. 611-613; Joseph Marino, R. 613-618; Hugh Wilbourn, R. 618-619; Marie Wilbourn, R. 620-621; Gilbert Andry, R. 621-624; Floyd Russell, R. 624-626; Virgie Niette, R. 626-639; Helaine Harp, R. 639-647; Bobbie Moffett, R. 648-652; Walter Gordon, R. 652-658; Bernard Sweeney, R. 659-660; Alfred Middleton, R. 660-662; Mrs. Charles Arbour, R. 662-667; Charles Arbour, R. 667-671; Bernard Keenal, R. 671-680; and Stevánna Stevens, R. 680-687.

The defense rested at 2:45 a.m., court recessed a little before 3 a.m., and reconvened at 9:30 the following morning. R. 687, 12. When court reconvened the next morning Mr. Gill and Mr. Link made their closing arguments to the jury on behalf of the accused and the trial judge charged the jury, which then retired to deliberate at 2:45 p.m. At 5:10 p.m. the jury announced to the court their verdict of guilty as charged on both counts as to all three of the accused. R. 12-13.

Under Article 320 of Louisiana's 1928 Code of Criminal Procedure, the granting or refusing of a continuance (or recess as it is called after the trial has begun, according to Article 708 of the 1967 Code) is within the sound discretion of the trial judge. It is well settled that the trial judge's refusal to grant a continuance or recess will not be reversed on appeal unless his ruling is found to be arbitrary and prejudicial. See *State v. Ganey*, 246 La. 986, 169 So.2d 73; *State v. Jones*, 233 La. 775, 98 So.2d 185; *State v. Forsyth*, 229 La. 690, 86 So.2d 536.

The State of Louisiana concedes that it was hard on the lawyers involved to get only a few hours of sleep on the night of March 21-22, 1966, during the trial of this case, but *how were the accused prejudiced?*

As the record herein bears out, Mr. Gill and Mr. Link called seventeen witnesses and put on a vigorous defense on the night of March 21-22. On the morning of March 22 Mr. Gill and Mr. Link made spirited arguments to the jury on behalf of the three accused—Mr. Gill's closing argument lasted for about an hour and a half. And during this time the defense reserved 8 bills of exception (bills 23-30).

Petitioners argue to this Court that the trial judge should have granted a recess at 11:40 p.m. on the first day of the trial because Mr. Gill was ill and tired. The answer to this contention is that Mr. Gill nevertheless conducted a competent defense in this case. If the contrary situation had prevailed, and Mr. Gill, or his associate, had not been able to adequately defend the accused, the trial judge would undoubtedly have called a recess before 2:45 a.m.

In *Mende v. United States*, 282 F.2d 881 (9th Cir. 1960), trial counsel requested a continuance because of a facial affliction. In finding no abuse of discretion on the part of the trial judge who denied the continuance, the Court of Appeals for the Ninth Circuit said: "The transcript indicates that this trouble did not affect the quality of counsel's mental activity."

It was held in *Maher v. State*, 144 Neb. 463, 13 N.W.2d 641, cert. denied 323 U.S. 757, 65 S.Ct. 91,

89 L.Ed. 606, that since it appeared from the record that defense counsel was vigorously active in behalf of his client and fully protected his interest throughout the trial, there was no abuse of discretion in denying a continuance requested because of counsel's health.

In *Day v. State*, 123 Tex.Crim. 9, 57 S.W.2d 581, in approving the refusal of a continuance where it had been claimed that the accused's attorney was suffering from a throat infection making it difficult for him to talk, the court noted the trial judge's statement that the defense was conducted very ably and that there was no difficulty in hearing counsel.

It was held in *Lewis v. State*, 125 Tex.Crim. 66, 65 S.W.2 771, that there was no error in refusing a continuance where an attorney who claimed to have been so ill as to be unable to properly represent his client appeared at the trial, ably presented the case, examined the witnesses and argued to the jury, showing no effects of his alleged illness.

For a discussion of the above cases and others on the same point, see Anno: Continuance—Counsel—Illness or Death, 66 A.L.R.2d 267, 275-279 (1959).

As for the contention raised *for the first time in Motion For a New Trial* that a couple of the jurors had fallen asleep during the trial, this Court's attention is directed to the fact that no objection to sleeping jurors was made at the trial. Mr. Gill admits that he made no such objection during trial, excusing himself on the ground that he was too tired to object at the time. R. 323. However, we note that Mr. Gill was not

too tired at this time to call and examine 17 defense-witnesses, argue to the jury for an hour and a half and reserve eight other bills of exception (bills 23-30). Further, all of the jurors who testified at the hearing of the Motion For a New Trial *categorically denied that any member of the jury had at any time been asleep during the trial.*

The evidence taken at the hearing on the Motion For New Trial shows that all of the jurors who testified vehemently denied that they or anyone else had been asleep during any part of the trial. According to the jurors who testified at this hearing, they had been alert and interested in the case at all times. R. 259-281, 36-367.

Furthermore, the record herein shows that on the night in question the trial judge asked the jurors whether they would prefer to work late or to recess early and come back, and that the jurors said that they would rather "work through and finish the case." R. 268-269, 347-348.

It is not as though the attorneys and the jury in the instant case were required to work night after night and day after day with little or no sleep. The episode complained of amounted to *one night;* the trial was finished by the afternoon of the following day. Surely adult men can miss a little sleep one night without having their faculties impaired. And if defense counsel is not hardy enough to stand the pace, the remedy is for him to have an associate help him with the trial when he becomes tired.

Moreover, the record in this case shows that Mr. Gill had *already been granted a great number of continuances* in the trial of the present matter. On January 18, 1966, on motion by defense the matter was continued until January 31, 1966. R. 5. On January 31, 1966, on motion by Mr. Gill the matter was continued until February 24, 1966. R. 5. On February 24, 1966, on motion by the defense the court ordered the case continued until March 15, 1966. R. 6. On March 15, 1966, on motion by defense the proceeding was continued until March 21, 1966. R. 6. As the trial judge told Mr. Gill when refusing to grant him a continuance at 12 midnight on March 21, 1966, "I know you have been ill and I know we have been having continuances on top of continuances because you have been ill but I have my duties to perform too and one of them is this case." R. 605.

The State of Louisiana calls this Court's attention to the fact that Mr. Gill produced no medical evidence whatsoever on the night of the trial when he asked for and was refused a continuance, nor did Mr. Gill produce medical evidence of disability the following morning (or even ask for a continuance at this later time), preferring to take his chance of an acquittal with the jury. It was only months later, at the hearing of the Motion For a New Trial, that Mr. Gill called his physician, Dr. Ben Morrison, into court to give evidence about counsel's alleged ill health at the time of the trial. R. 337 et seq. If Mr. Gill had really been ill on the night of the trial, he could easily have contacted Dr. Morrison during the thirty-five minute recess

which preceded the putting on of the defense herein, and Dr. Morrison could have offered evidence on the condition of Mr. Gill's health to the court that very night, or the following morning before court reconvened at 9:30 a.m. Also, it should be noted that Mr. Gill's associate, Mr. Robert Link, was at all times present in court and ready to assist Mr. Gill during the trial, but was never called on for help by Mr. Gill, who conducted the defense himself. See R. 605-688.

In concluding argument on this third point the State of Louisiana respectfully contends to this Court that the accused herein suffered no prejudice from the ruling of the trial judge refusing to grant the defense more than a 35 minute recess after the prosecution had rested on the first day of the trial. That the accused were in no way prejudiced by this ruling is clear from the vigorous defense put on by Mr. Gill and Mr. Link on the night of March 21-22, when they called seventeen witnesses to the stand, from their vehement arguments to the jury the following morning (Mr. Gill's argument lasted about 1½ hours), and from the many bills of exception reserved by defense counsel during this period of the trial. In addition, the testimony of the jurors who took the stand at the hearing on the Motion For a New Trial showed positively that the jury in this case wanted to work late into the night and had so informed the judge, and that the jurors remained alert and interested in the proceedings throughout the trial.

CONCLUSION

The State of Louisiana respectfully requests that this Honorable Court deny the Petition for Certiorari which has been filed in the above-captioned matter.

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CERTIFICATE OF SERVICE

I, William P. Schuler, a member of the Bar of the Supreme Court of the United States, certify that a copy of the above and foregoing brief has been served on counsel for appellant by depositing same in the United States Mail, postage prepaid, addressed as follows:

G. W. Gill, Sr. Esq.
George M. Leppert, Esq.
1707 Pere Marquette Bldg.
New Orleans, La. 70112

Robert S. Link, Sr. Esq.
National Bank of
Commerce Bldg.
New Orleans, La.

New Orleans, Louisiana, this ..... day of May, 1968.

WILLIAM P. SCHULER

B-1379, 5-68